In the Supreme Court of the United States.

OCTOBER TERM, 1919.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office, Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA, ex rel. ALLEN L. NEWTON.

No. 405.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

For the purpose of consideration of the motion to dismiss it is deemed unnecessary to do more than briefly set forth the issues raised in this case by the plaintiffs in error and their contention with respect to them.

To the rule to show cause issued upon relator Newton's petition, plaintiffs in error answered that the land covered by Newton's homestead entry had, prior to the application for that entry, been withdrawn for forestry purposes and subsequently included in a national forest; that the allowance of Newton's entry in the face of the withdrawal of the lands, and the issuance of final receipt and certificate thereon by the officials of the Land Department were obtained by the entryman fraudulently by

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means of false representations and proofs to the effect that he had made settlement upon the lands prior to withdrawal, and had since that settlement resided continuously thereon and cultivated a portion of the lands. It was further averred that said representations were made by Newton with full knowledge of their falsity and with intent to deceive the officials of the Land Department, and that said officials were deceived and acted in reliance thereon.

It was further alleged that should a patent issue on Newton's entry, it would be the duty of the respondents, the Secretary of the Interior and the Commissioner of the General Land Office, to request the Attorney General to institute suit for its cancellation, in view of the clear, unequivocal and convincing evidence of fraud in relation to the entry; that a suit had been instituted in the United States District Court for the western district of Washington by the United States against Newton and others to cancel, on the ground of fraud, the final receipt and certificate issued to Newton and to quiet title in the United States in and to the land involved in the entry; and that that suit was pending and undetermined.

We assert that the courts below were in error in awarding a mandamus, in view of the pendency of the suit brought to cancel the final receipt and certificate and to quiet title. Neither of the courts below appears to have given proper consideration to that point although it was squarely presented. It can not in reason be contended that the Secretary of the Interior should issue a patent to Newton

when there is before him clear evidence of such fraud as would vitiate the patent. The Secretary would do a vain and foolish thing to issue a patent and then immediately cause suit to be filed to cancel that patent for fraud known to him when he issued it. *Knight* v. *Land Association*, 142 U. S. 161, 178. And if the Secretary should not issue a patent there is less reason for urging that the courts, by mandamus, should compel him to do so when fraud is shown. The Government has a right of action because of the fraud; if it can not obtain redress in the Land Department it surely can in the courts, and its right thereto is not dependent upon the issuance of patent.

Again, the issuance of a writ of mandamus in this case is improper because, in view of the fraud, Newton does not come into court with clean hands. The writ will not issue to condone or perpetuate a fraud. *Duncan Townsite Company* v. *Lane*, 245 U. S. 308, 311.

Finally, we firmly believe that this case is clearly distinguishable from the case of *Lane* v. *Hoglund*, 244 U. S. 174, upon which the courts below relied.

The proviso to section 7 of the act of March 3, 1891, 26 Stat. 1095, 1099, about which this controversy centers, is in our view a statute of limitation upon action by the Land Department but is not applicable in cases of fraud. Fraud is alleged in this case. Indeed, it was proved in the contest proceedings had before the Land Department which resulted in the cancellation of Newton's entry. Therefore, in the face of fraud, the statute is not operative to deprive

the Secretary of the Interior of power to take jurisdiction of contest proceedings testing the validity of an entry.

In *Lane* v. *Hoglund*, *supra*, there was no allegation of fraud in the procurement of the allowance of the entry and the issuance of final receipt and certificate, as in this case. The pleadings and agreed statement of facts in that case contained no allegation or statement that the entry had been canceled for fraud. The decision in the *Hoglund* case must be read in the light of the record before the court in that case. The question of the effect of fraud upon the operation of the proviso to section 7 of the act of March 3, 1891, was not presented to or apparently considered by the court in the *Hoglund* case.

The purpose of the proviso was to relieve *bona fide claimants* from hardship due to delay on the part of the General Land Office in acting on entries. It was not intended to reward fraud.

These points will be more fully discussed in the brief which will be presented when the case is heard on the merits. The outline here given is thought amply sufficient to show the merit in the case, and it follows that the motion to dismiss or affirm should be denied.

Respectfully submitted.

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Special Assistant to the Attorney General.

FEBRUARY, 1920.

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